In The

Supreme Court of the United States

October Term, 1979

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No. 78-1707

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THOMAS DALY,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

—o—

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I.

OPINIONS BELOW

The opinion here brought into question by the petitioner is *State v. Daly*, 202 Neb. 217, 274 N. W. 2d 557 (1979).

II.

JURISDICTION

The respondent accepts the petitioner's invocation of this Court's jurisdiction.

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III.

CONSTITUTIONAL PROVISION INVOLVED

The respondent accepts the petitioner's statement of the constitutional issues involved.

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IV.

QUESTION PRESENTED

The respondent believes the sole issue presented for review here is whether the smell of marijuana standing alone is sufficient to furnish probable cause for the warrantless search of a motor vehicle, where the law enforcement officer has been found to have the requisite ability to recognize the scent in question. The propriety of the initial stop we do not believe to be in question here and the petitioner does not argue the question of the basis for his arrest.

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V.

STATEMENT OF THE CASE

At 8:55 p.m., on March 8, 1977, Officer Byron R. Lane of the Nebraska State Patrol, while traveling west on Interstate Highway No. 80 approximately 1½ miles east of the Ogallala interchange, observed defendant's vehicle traveling eastbound on the interstate. Using a radar gun, the officer clocked the speed of defendant's vehicle at 60 miles per hour, or 5 miles over the maximum speed limit. Officer Lane made a U-turn, pursued the vehicle, and pulled it over to the side of the road.

Lane met defendant near the left rear of defendant's vehicle, a pickup with a fiberglass shell covering the rear portion. He asked to see the driver's license and registration certificate of the defendant, which he produced. Lane then walked to the front of the pickup, accompanied by defendant, to check whether it had a front license plate. Lane testified while walking alongside the pickup he detected a faint odor of raw marijuana which he believed was coming from the rear of the vehicle.

Lane directed defendant to take a seat in the patrol car. He issued a warning ticket for speeding and then asked defendant whether there was any marijuana in his vehicle. Defendant replied "No." Lane then requested permission to look inside the vehicle, which defendant refused. At that time Lane advised defendant he had smelled marijuana in the vehicle. They left the patrol car and walked to the rear of defendant's vehicle where Lane again advised defendant he could smell marijuana. He asked defendant to open the rear of the pickup. Defend-

ant asked what the procedure was. At that time Lane placed defendant under arrest and gave him the Miranda warnings. Defendant then opened the rear of the pickup.

When the rear door of the pickup was opened, Lane could smell a strong odor of marijuana. Inside he found several large boxes and a large plastic bag containing marijuana. The marijuana was in kilo form wrapped in cellophne and paper. The parties stipulated that 582 pounds of marijuana were removed from the vehicle.

Officer Lane has been a member of the Nebraska State Patrol since November 1974. During basic training and on-the-job training he had received instruction in drug recognition, including marijuana. He had also made approximately 50 prior arrests for possession of marijuana. All of these arrests followed stops for traffic violations and were made after the officer smelled marijuana. Taken from opinion in *State v. Daly, supra.*

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ARGUMENT

A.

A law enforcement officer observing a traffic violation has a reasonable basis upon which to stop a motorist.

Initially the petitioner expresses his concern over the means by which the State of Nebraska circumvents the probable cause requirements of the Fourth Amendment in stopping citizens on one highway in this state. Although

the petitioner expends a majority of his argument addressing this "problem," he is wrestling with a straw man. That issue has no relation to the facts of this case. The arresting officer had probable cause to stop the petitioner.

The petitioner was stopped because radar operated by the arresting officer had indicated the vehicle the petitioner was operating had exceeded the posted speed limit. The petitioner was stopped for speeding. The petitioner fails to direct our attention to any Fourth Amendment problems with a person being stopped on the highway by a law enforcement officer under the circumstances presented here.

Once the officer came in contact with the petitioner he detected the odor of marijuana eminating from the petitioner's vehicle. The questions here are solely the ability of the officer to make the observation he testified to and his credibility in relating those observations under oath. Both of these factual issues were resolved in favor of the officer.

This case does not present a problem of confusing adequate cause to stop a motorist with probable cause to search or arrest. The officer had a reasonable basis for the stop, a speeding violation. Once the officer came in contact with the petitioner and his vehicle and noted the odor of marijuana coming from the vehicle his subsequent actions were justified. We are not confronted with facts similar to those present in *United States v. Humphrey,* 409 F. 2d 1055 (10th Cir. 1969) cited by the petitioner. There the search began simply as an incident to stop for a traffic violation. Here once the stop for the traffic violation occurred additional evidence of criminal activity became

available to the officer without any search of the vehicle. The officer smelled marijuana. That additional fact, we believe, removes this case from the type of searches discredited by the Court in *Humphrey*. As we discuss in the next section of our argument the educated recognition of the odor of marijuana provided the officer adequate grounds to proceed as he did without doing violence to the protections afforded by the Fourth Amendment.

B.

The courts of this nation are not in conflict concerning the interpretation of the Fourth Amendment with respect to whether the odor of marijuana alone creates probable cause to search a motor vehicle.

The petitioner now argues that this court should grant certiorari because federal and state courts are in conflict whether or not the odor of marijuana alone can constitute probable cause to search a motor vehicle. The petitioner is correct in his statement that the Supreme Court of Nebraska has held that the smelling of marijuana, by a law enforcement officer shown to have the requisite expertise to recognize that scent, provides adequate probable cause to search a vehicle. See, *State v. Benson*, 198 Neb. 14, 251 N. W. 2d 659 (1977); *State v. Daly, supra; State v. Ruzicka*, 202 Neb. 257, 274 N. W. 2d 873 (1979).

At the outset we note that the facts of this case involve solely the question of probable cause to search a motor vehicle. This case does not involve the search of a dwelling. The standards applicable to searches of motor vehicles are distinct. *Carroll v. United States*, 267 U. S. 132 (1925). As we believe the following discussion will reveal, this distinction has apparently been lost on the petitioner.

The petitioner alleges the Courts of Oregon, Georgia and New York have adopted a rule of law contrary to that adopted by the Supreme Court of Nebraska in the present case. The cases cited by the petitioner in support of this allegation either stand for a different proposition of law than that alleged or contain crucial factual distinctions from the present case.

The petitioner cites *State v. Childers*, 511 P. 2d 447 (Ore. 1973). This case does not stand for the proposition forwarded by the petitioner. In fact, the Oregon Court recognized with approval the very rule announced by the Supreme Court of Nebraska in this case. *Childers* involved the search of a motor vehicle.

> "In its brief the state correctly points out that when an officer smells marijuana in a vehicle, he has probable cause to believe that a crime is being committed in his presence, and probable cause to search for evidence of the crime." 511 P. 2d at 450.

The search in *Childers* was found invalid not for want of the rule of law in question here, but simply because the officer's observations were inadequate.

> ". . . Deputy Oachs did not have probable cause to arrest and search since the officer was so uncertain as to whether he had really smelled the odor of marijuana." 511 P. 2d at 450.

Apparently, had the officer in *Childers* been as certain of his observations as the officer in the petitioner's case was, the Oregon Court would have announced the same rule

established by the Supreme Court of Nebraska in this case. The petitioner cites *Brewer v. State*, 129 Ga. Supp. 118, 199 S. E. 2d 109 (1973). Initially *Brewer* involves the search of a residence, not a motor vehicle. A state statute mandated the use of a warrant to search a residence.

> "The sheriff and his deputy were, in our opinion, not entitled to be where they were when they smelled the odor of marijuana. . . ." 199 S. E. 2d at 112.

The Georgia Court went on to note that the smell of marijuana was not enough to support an *arrest* for using or passing marijuana where there were many people present in the room at the time the officers entered, but in view of its holding that statement is not crucial to the decision reached.

The petitioner next cites *People v. Bennett*, 28 A. D. 2d 526, 280 N. Y. S. 2d 258 (1967). In *Bennett* the defendant was initially arrested in a hotel hallway and a suitcase seized. The officers then entered the defendant's room and seized additional evidence. The only discussion of odor as probable cause is:

> "The officers testified that before apprehending the defendant [in the hallway], they saw, exposed to view, the marijuana in the suitcase and one of them testified that he detected the odor thereof. Thus, the seizure of the suitcase and contents was proper." 280 N. Y. S. 2d at 259.

It was only the seizure of the material subsequently discovered in the defendant's room which the New York Court suppressed.

The jurisdictions of Oregon, Georgia and New York have not fostered interpretations of the Fourth Amend-

ment contrary to the rule announced by the Supreme Court of Nebraska in the petitioner's case.

The petitioner next cites as conflicting authority two cases from the Fifth Circuit. *United States v. Johnston*, 497 F. 2d 397 (5th Cir. 1974) and *United States v. Troise*, 438 F. 2d 615 (5th Cir. 1973). The petitioner does not cite the more recent cases of *United States v. Wright*, 588 F. 2d 189 (5th Cir. 1979) and *United States v. Michel*, 588 F. 2d 986 (5th Cir. 1979) (United States appeal pending), which clearly support the rule adopted by the Supreme Court of Nebraska in this case. *Michel*, which involves the search of a motor vehicle is particularly supportive.

> "Moreover, when Deputy Oxford arrived at the scene shortly thereafter to begin his investigation * * * [he] smelled marijuana, probable cause clearly existed for a warrantless search of the truck." 588 F. 2d at 998.

The petitioner also cites *United States v. Diamond*, 47 F. 2d 771 (9th Cir. 1973). We are unable to discuss that case, as we have been unable to discover if such a case exists. Certainly, it cannot be found at the citation provided by the petitioner.

United States v. Pond and Farrelli, 382 F. Supp. 556 (S. D. N. Y. 1974) *aff'd*, 523 F. 2d 210, *cert. denied*, 423 U. S. 1058, is cited by the petitioner as conflicting with those cases discussed above. However, the facts of *Pond and Farrelli* have nothing to do with the facts of this case. *Pond and Farrelli* does not involve the search of a motor vehicle. It involves the search of luggage. Furthermore, *Pond and Farrelli* involves the search of luggage by officers in possession to a warrant to search that luggage.

The simple holding of *Pond and Farrelli,* as it relates to issues raised in this case, is that detection of odors of contraband did provide adequate probable cause for the issuance of a search warrant. This conclusion was reached by reference to cases discussing the search of premises other than motor vehicles. Language contained in that case which indicates that detection of odor alone would not support a warrantless arrest or search does not reflect the facts present and is purely dicta.

United States v. Bell, 383 F. Supp. 1298 (D. Neb. 1974), is cited by the petitioner as indicating a conflict in the interpretation of the Fourth Amendment between the Supreme Court of Nebraska and the United States District Court for that district. *Bell* will not support that allegation. Although *Bell* does involve the search of a motor vehicle it does not involve the issue raised by this case at all. In *Bell* the defendant's van was stopped by an officer to determine if it possessed a front license plate. The sole issue decided by the district court was that the initial stop was improper. So far as the holding of *Bell* is concerned the results of the subsequent search of the vehicle were suppressed as fruits of an improper stop. The district court was never presented with or discussed the issue here raised.

Finally, the petitioner cites *United States v. Lovengath,* 514 F. 2d 96 (9th Cir. 1975), as indicating a different interpretation of the Fourth Amendment has been adopted by the 9th Circuit Court of Appeals than the ruling here challenged. *Lovengath* simply does not stand for the proposition urged by the petitioner. Although scent alone was not the basis of the warrantless search allowed in *Lovengath,* the Court stated:

> "The search that followed the stop was also legal. [Officer] Morgan detected the odor of marijuana as he stood beside the pickup, and he saw green plastic bags in the camper. Morgan had probable cause to conduct the search." 514 F. 2d at 99.

The petitioner does not discuss the more recent case of *United States v. Solomon,* 528 F. 2d 88 (9th Cir. 1975), cited by the Supreme Court of Nebraska in support of its ruling in this case. *Solomon* involved evaluating the warrantless search of a motor vehicle under facts and issues much more analogous to the present case.

> "Once [Officer] Sonka entered the car, he smelled marijuana. This gave him probable cause to search the inside of the car and, after finding no marijuana there, the trunk." 528 F. 2d at 88.

The *Solomon* Court cited as authority for its decision *United States v. Lovengath, supra.*

CONCLUSION

As the Supreme Court of Nebraska stated in its opinion in this case:

> ". . . [T]he sole issue is whether the smell of marijuana standing alone is sufficient to furnish probable cause for the warrantless search of a motor vehicle. . . ." *State v. Daly, supra,* at 219.

We do not believe the petitioner has called to the attention of this Court any authority to support his allegation that federal and state courts are in conflict on this issue. This particular issue has not been ruled on by this Court and certainly such a ruling would resolve this issue

for all concerned. However, in the absence of a ruling from this Court on the issue presented here we do not believe the interpretation of the Fourth Amendment represented by the ruling of the Supreme Court of Nebraska in this case indicates anything other than an attempt to harmonize with cases on that issue from other jurisdictions.

Respectfully submitted,

STATE OF NEBRASKA,
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